IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28-07-2006

CORAM

THE HONOURABLE MR. JUSTICE P.K. MISRA
AND
THE HONOURABLE MR. JUSTICE M. JAICHANDREN

O.S.A.NOs.401 OF 2002 and 128 OF 2005

O.S.A.NO.401 of 2002

D.V.D' Monte
No.21, Medavakkam Tank Road,
Chennai 600 012. .. Appellant/1st Defendant

Vs.

1. N. Venkatesh
2. N. Kasi Viswanathan
3. N. Ramesh
   No.18, 6th Cross Street,
   Shastri Nagar, Adyar,
   Chennai 600 020.
4. Anne D' Monte
5. David D' Monte
6. Garad D' Monte
7. Paul D' Monte
8. Marlene D' Monte
9. Kay D' Monte
10. Rose Mary D' Monte
    No.21, Medavakkam Tank Road,
    Chennai 600 012. .. Respondents/Plaintiffs 1 to 3, Defendants 2 to 8

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O.S.A.No.128 of 2005

1. N. Venkatesh
2. N. Kasi Viswanathan

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3. N. Ramesh
   No.18, 6th Cross Street,
   Shastri Nagar, Adyar,
   Chennai 600 020. .. Appellants/Plaintiffs 1 to 3

Vs.

1. D.V.D' Monte
2. Anne D' Monte
3. David D' Monte
4. Garad D' Monte
5. Paul D' Monte
6. Marlene D' Monte
7. Kay D' Monte
8. Rose Mary D' Monte
   No.21, Medavakkam Tank Road,
   Chennai 600 012. .. Respondents/Defendants 2 to 8

Appeals filed against the judgment and decree of the learned single Judge dated 25.7.2002 in C.S.No.180 of 1990.

For Appellant : Mr.S. Sampath Kumar
in OSA.No.401/02 & Senior Advocate for
For Respondents in M/s.Sampath Kumar &
OSA.No.128/2005 Associates

For Respondents 1st
in OSA.No.401/2002 &: Mr.R. Subramanian
for Appellants in Senior Advocate for
OSA.No.128/2005 Ms.S. Hemalatha

R-2 No Appearance)OSA 401/2002
R3 Proof of Publication)
RR4 to 10 Given up)

COMMON JUDGMENT

P.K. MISRA, J

O.S.A.No.401 of 2002 has been filed by the first defendant in C.S.No.180 of 1990 against the part of the decree directing him to pay a sum of Rs.4,13,300/-. On the other hand, the plaintiffs have filed the connected O.S.A.No.128 of 2005 against the refusal of the learned single Judge in granting a decree for specific performance of the contract. Both the appeals have been heard together.

For convenience, parties are referred to as they are described in C.S.No.180 of 1990.

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2. The plaintiffs had made the following averments:-

Three plaintiffs are brothers, being the son of one A. Narayanaswami. Defendants 2 to 8 are the children of the first defendant. The first defendant entered into an agreement dated 13.5.1981 mainly with the plaintiffs and their mother and one S. Padmanabhan. First defendant's wife and children were also shown as partners. The agreement was to sell the property situate at Nos.15, 16 & 17, Wallers Road for a consideration of Rs.13,00,000/-. First defendant received an advance of Rs.2 lakhs from the plaintiffs and his mother and handed over all the original documents as collateral security for the advance paid. First defendant had agreed to demolish the superstructure standing on such land and to deliver possession to the plaintiffs to enable them to start construction work. Major portion of the building was demolished by the Contractor, but some portion was not demolished since the same was under the lock and seal in view of order of attachment issued by Courts at the instance of one B.K. Sagar of Delhi. The plaintiffs had submitted the building Plan to the M.M.D.A and the Corporation authorities in February and March 1982 after getting the signature of the first defendant, but because of the attachment proceedings, such work had been stopped. Apart from the advance of Rs.2 lakhs, which was acknowledged in the agreement, the first defendant had received a further sum of Rs.1,44,500/- from the plaintiffs on different dates. Further the first defendant had borrowed a sum of Rs.40,000/- on different dates from one N. Balakrishnan and others by executing pro-notes on the guarantee of the first plaintiff and on the collateral security of the original documents. Since the first defendant was not in a position to repay such principal and interest, as guarantor the first plaintiff had paid principal and interest and got necessary endorsements and receipts for claiming from the first defendant. Total amount under the pro-notes with interest was Rs.1,18,336/- as on July 1987. Interest on Rs.1,18,336/- at 24% works out at Rs.70,800/- upto January 1990, which sum should be treated as further payment apart from the payment of Rs.2 lakhs and Rs.1,44,500/-. Thus the total payment of Rs.5,33,736/- had been made by the plaintiffs. Under the agreement of sale, the first defendant wanted to have 2000 sq.ft in the first floor for his own use agreeing to pay a lesser price than the prevailing market value. The balance consideration was to be paid by the plaintiffs within 18 months from the date of handing over of vacant site for construction. Under the partnership deed dated 13.5.1981, the first plaintiff was the main party, who arranged for negotiation of purchase, and the plaintiffs had paid the consideration. Their mother expired on 5.2.1983 and their father had released his interest in such estate of his wife in favour of the plaintiffs. S. Padmanabhan, who was the working engineer and Mrs.D' Monte, wife of the first defendant, have been taken at the suggestion of the first defendant for protecting the interest of the first

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defendant in the transaction and they are not bound to contribute any capital, but to share 50% of the loss and profit in the deal. Such S. Padamanabhan had also died. While the matter stood thus, all of a sudden, the first defendant sent a letter dated 25.6.1987, while the agreement was still alive, stating that the agreement was abandoned and for return of the original title deeds without making any whisper regarding the advance payment of Rs.2 lakhs and further payments totalling Rs.5,33,736/-. The defendants who are all the family members of the first defendant, had signed the enclosed letter dated 23.6.1987 stating that the business venture had been abandoned and they have no objection to hand over the title deeds to the first defendant. A reply dated 3.7.1987 was sent by the plaintiffs' Advocate. In such changed circumstances, the plaintiffs alone were willing to pay the balance consideration, provided the first defendant got a clearance from the court. Under the partnership deed dated 13.5.1981, Mrs.D'Monte and her children on their retirement were entitled to share the profit and loss. In the reply dated 3.7.1987, the plaintiffs claimed Rs.2,77,368/- as loss from the defendants stating that they had paid a total sum of Rs.3,44,500/- as per the agreement towards sale consideration which will carry interest at the rate of 18% from the date of investment, which works to Rs.4,82,400/-. It was also claimed that the plaintiffs had discharged the pro-notes which comes to Rs.1,18,336/- and the total investment of the plaintiffs for the purpose of partnership as on July 1987 comes to Rs.9,45,850/-. The plaintiffs had also indicated certain amounts payable by other defendants. The first defendant had sent a rejoinder dated 20.8.1987 stating that the agreement was abandoned and indicating that only a sum of Rs.1,05,000/- had been paid, denying the payment of Rs.2 lakhs under the agreement and denying the borrowing. On the basis of such averment, the plaintiffs prayed for a direction to the defendants to specifically perform the terms of the joint venture agreement dated 13.5.1981 on payment of the balance sum of Rs.4,90,846/- or in the alternative directing the defendants to pay the plaintiffs a sum of Rs.8,09,204/- with interest at 24% from the date of plaint till realisation and for other ancillary reliefs.

3. Written statement was filed only by the first defendant. In such written statement it was indicated that the agreement was dated 13.5.1981 and the suit having been filed on 20.2.1990, was barred by limitation. It was also indicated that the suit for specific performance of the contract was liable to be dismissed as the plaintiffs had not indicated that they were ready and willing to perform their part of the contract. It was further stated that the agreement was between 13 persons, out of which three persons, namely S. Indrani, L.T.D' Monte and S. Padmanabhan, were dead and the suit for specific performance of the contract at the instance of three plaintiffs alone was not maintainable. It was further stated that the plaintiffs were never ready and willing to perform their part of

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the contract. It was specifically denied that a sum of Rs.2 lakhs had been received as advance at the time of the agreement. The allegation relating to other payments was also denied partially.

4. Learned single Judge framed the following issues :-

"1. Whether the suit is barred by limitation?

2. Whether the suit is liable to be dismissed for want of compliance with Section 16(c) of the Specific Relief Act?

3. Whether the suit by three out of 12 purchasers for specific performance of the contract where 9 purchasers have repudiated the contract maintainable ?

4. Whether the plaintiffs were ready and willing to perform their part of the contract dated 13.5.1981 ?

5. Is it true that the plaintiffs have abandoned the contract ?

6. Is it true that the plaintiffs paid a sum of Rs.2,00,000/- as advance ?

7. Whether the payment of Rs.1,44,500/- alleged by plaintiff is true ?

8. Whether the plaintiff is entitled to adjust the sum payable under the promissory note dated 23.8.1981, 21.12.1981 and 5.1.1982 towards the sale consideration ?

9. Whether the claim for interest in the sum of Rs.70,800/- sustainable ?

10. Whether the plaintiffs have resources to purchase the suit property ?

11. Whether the plaintiffs have carried out their part of the agreement ?

12. Whether the defendants 2 to 8 are not name-lenders for the 1st defendant ?

13. Whether the profit or loss has to be carried out in the account of the first defendant?

14. To what relief is the plaintiffs entitled to ?"

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5. All the issues were taken up together. Learned single Judge found that the agreement dated 13.5.1981 had been executed and a sum of Rs.2 lakhs had been paid as advance on the date of agreement and in all a sum of Rs.4,13,300/- had paid on different dates under varying heads. The agreement of sale was in favour of a partnership firm, of which the plaintiffs 1 to 3 and the defendants 2 to 8 as well as three deceased persons were partners, and since such partnership had not been registered under Section 69 of the Partnership Act, 1932 the suit for specific performance of contract was hit by the bar contained under Section 69(2). It was also found that the plaintiffs have failed to prove that they were ready and willing to perform their part of the contract. On the basis of the aforesaid conclusions, the learned single Judge passed a decree for payment of Rs.4,13,300/- with interest at 18% from different dates with a stipulation that till the amount is paid the same shall be a charge on the property and with a further stipulation that on such repayment being made, the plaintiffs have to hand over all the original documents of title to the first defendant.

6. Learned Senior Counsel appearing for Defendant No.1 (Appellant in OSA.No.401 of 2002) has submitted that in view of the finding that the prayer for specific performance is hit by Section 69 of the Partnership Act, on the basis of the same reasoning, the prayer for refund of the amount should have been refused. It is further submitted that even assuming that certain amount is refundable, the conclusion of the trial court that a sum of Rs.4,13,300/- had been paid to Defendant No.1 is not sustainable and at any rate the learned single Judge should not have directed for payment of interest at the rate of 18% from the various dates indicated.

7. Learned Senior Counsel appearing for the plaintiffs (Appellants in OSA.No.128 of 2005) has contended that the learned single Judge should have passed a decree for specific performance of the contract. In the alternative, it has been submitted that, in case the decree for specific performance could not be granted, the decree directing refund of the amount along with 18% interest should be sustained.

8. On the basis of the submissions made by the learned counsels appearing for both the parties, the following questions arise for determination :-

(1) Whether the learned single Judge has erroneously concluded that the relief of specific performance of contract cannot be granted in view of Section 69 of the Partnership Act ?

(2) Whether the conclusion of the learned single Judge that the plaintiffs were not ready and willing to perform their part of the

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contract is sustainable ?

(3) Whether the prayer relating to refund of consideration is liable to be rejected by applying the principle laid down under Section 69 of the Partnership Act ?

(4) Even assuming that prayer for refund can be entertained, whether the conclusion that a sum of Rs.4,13,300/- is to be refunded is justified on the basis of the materials on record ?

(5) Whether the direction regarding payment of interest at the rate of 18% from various dates indicated is justified ?

9. The provisions contained in Section 69(2) and (3) of the Partnership Act, being relevant for deciding the first question, are extracted hereunder :-

> 69. Effect of non-registration.-
>
> (2) No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.
>
> (3) The provisions of sub-sections (1) and (2) shall apply also to a claim of set-off or other proceeding to enforce a right arising from a contract, but shall not affect,-
>
> (a) the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realise the property of a dissolved firm, or
>
> (b) the powers of an official assignee, receiver or Court under the Presidency-towns Insolvency Act, 1909, or the Provincial Insolvency Act, 1920, to realise the property of an insolvent partner."

10. In the present case, admittedly the agreement Ex.P-1 was executed by the first defendant in favour of the partnership firm consisting of 13 partners. It is admitted that such partnership was constituted by virtue of a written agreement, but such partnership had not been registered. Even though the defendants 2 to 8 have disclaimed any continuing interest in the partnership, the fact remains that such partnership had not been registered. The bar under Section 69(2) is squarely applicable. Even though the learned Senior Counsel appearing for the plaintiffs 1 to 3 contended that in fact such contract was entered by the plaintiffs 1 to 3 in their private

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capacity and the partnership was created only on paper with a view to safeguard the interest of the first defendant by including his relations in the partnership, such a submission cannot be countenanced. There is a clear recital in the agreement that the agreement of sale was in favour of the partnership. Since admittedly such partnership was not registered, there is no escape from the conclusion that the suit was not maintainable.

11. A faint submission was made by the plaintiffs that such a plea was not raised initially and only in course of hearing such question was raised. The question has been discussed by the learned single Judge on the basis of the admitted case and admitted materials on record. In such view of the matter, the contention of the plaintiffs is not acceptable. The finding of the learned single Judge that the relief for specific performance of the contract cannot be granted in view of the bar under Section 69 of the Partnership Act is to be confirmed.

12. The contention relating to lack of plaintiffs'/ appellants' readiness and willingness on their part to perform their part of the contract is not only irrelevant in view of the conclusion that the prayer for specific performance of contract is hit by the provision contained in Section 69(2) of the Partnership Act, but also untenable. The learned single Judge has referred to various materials on record on such aspect. No submission of any substance has been made to come to any different conclusion. Such finding is also therefore confirmed. The appeal filed by the plaintiffs is therefore dismissed.

13. The next question is relating to applicability of the bar under Section 69(2) of the Partnership Act vis-a-vis the direction given by the learned single Judge for refund. The main contention of the Senior Counsel appearing for Defendant No.1 is to the effect that such amount was allegedly paid by and on behalf of the partnership and since the partnership has not been registered, the suit is not maintainable in view of the provisions contained in Section 69(2) of the Partnership Act. Learned Senior Counsel appearing for the plaintiffs on the other hand has submitted that a suit for realisation of the property of a dissolved firm can be filed.

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14. Learned Senior Counsel for the first defendant has relied upon a decision of the Supreme Court reported in AIR 1977 SC 336 (LOONKARAN SETHIA ETC., v. IVAN E. JOHN AND OTHERS ETC.,). In the said case, even though the plaintiff had contended that there had been dissolution of the partnership firm Sethiya & Co., such plea was discarded and the Supreme Court came to the conclusion that the dissolution of the partnership firm having not been established, it must be taken that the agreement was entered into between a

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partnership in existence and the defendant. On the basis of the aforesaid finding, it was observed :-

> "21. A bare glance at the section is enough to show that it is mandatory in character and its effect is to render a suit by a plaintiff in respect of a right vested in him or acquired by him under a contract which he entered into as a partner of an unregistered firm, whether existing or dissolved, void. In other words, a partner of an erstwhile unregistered partnership firm cannot bring a suit to enforce a right arising out of a contract falling within the ambit of Section 69 of the Partnership Act. In the instant case, Seth Suganchand had to admit in unmistakable terms that the firm 'Sethiya & Co.' was not registered under the Indian Partnership Act. It cannot also be denied that the suit out of which the appeals have arisen was for enforcement of the agreement entered into by the plaintiff as partner of Sethiya & Co., which was an unregistered firm. That being so, the suit was undoubtedly a suit for the benefit and in the interest of the firm and consequently a suit on behalf of the firm. It is also to be borne in mind that it was never pleaded by the plaintiff, not even in the replication, that he was suing to recover the outstandings of a dissolved firm. Thus the suit was clearly hit by Section 69 of the Partnership Act and was not maintainable."
>
> (Emphasis added)

15. It is submitted by the learned Senior Counsel appearing for the plaintiffs that the decision of the Supreme Court cannot be read to mean that a suit to recover the outstandings of a dissolved firm is hit by Section 69 of the Partnership Act. Learned Senior Counsel has rightly submitted that in fact the aforesaid decision indirectly supports the contention of the plaintiffs that a suit can be filed for realisation of the outstandings or the property of a dissolved firm.

16. Learned Senior Counsel appearing for the plaintiffs has placed reliance upon a decision of the Madras High Court reported in AIR 1948 Madras 187 (SHANMUGHA MUDALIAR v. P.V. RATHINA MUDALIAR AND ANOTHER). In that case, the Division Bench had occasion to deal with a similar question wherein the amount due and payable to an unregistered dissolved partnership firm was sought to be recovered by means of a suit, which was resisted by the defendant by relying upon the embargo contained in Section 69. In the above context, it was observed :-

> "(6) When a firm has been dissolved, thereafter it is impossible for registration ever to be effected. Consequently the disability of non-registration cannot be

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overcome, as it can be during the continuance of the partnership, when the partners can, at any time, register as required by the Act and any disability existing upto that time regarding enforcement by suit of contracts and debts due to the partnership can be removed.

(7) The words in sub-section (3) of Section 69 which I have quoted above are very wide. The sub-section enacts that the provisions of the two previous sub-sections shall not affect any right or power to realise the property of a dissolved firm. It is the right of all the partners, or by some arrangement as between themselves, one or more, to realise the property of their late partnership. In the course of the argument it has not been suggested that moneys due to the partnership from a third party in respect of dealings between him and the partnership do not form part of the partnership property. It seems to me that the intention of the Legislature was to inflict disability for non-registration only during the subsistence of the partnership and in doing that, at the same time there is provision that the partnership can cause the disability to be removed by registration before action is brought, although there was disability, by reason of non-registration, existing at the time the contact was made or the debt incurred. When a partnership has been dissolved the disability cannot be removed. Consequently it will be impossible, if a different view were taken of the provisions of sub-section (3), for a dissolved unregistered partnership to recover by suit its assets and property."

17. Apart from the aforesaid decision, learned Senior Counsel for the plaintiffs has relied upon several decisions, many of which have been referred to and relied upon in AIR 1968 Patna 96 (BASANTLAL JALAN V. CHIRANJILAL SARAWGI AND OTHERS). While dealing with the question of bar under Section 69, after referring to the provisions contained in Section 69 of the Partnership Act, it was observed as follows :-

"(9) ... Reading the aforesaid clause, it is apparent that apart from suing for dissolution of a firm or for accounts of a dissolved firm, an exception has been made also in case of any right or power to realise the property of a dissolved firm."

18. Similar view has been subsequently expressed by a learned single Judge of Gujarat High Court reported in AIR 1994 Gujarat 56 (SHRI KANTILAL JETHALAL GANDHI v. GHANSHYAM RATILAL VYAS) by observing as follows :-

"4. ... It is true that sub-section (2) of Section 69

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of the Act bars a suit to enforce a right arising from a contract by or on behalf of a firm against any third party if the firm is not registered under the Act. If this provision was alone on the statute book, the conclusion reached by the trial Court against the present appellant might have proved unassailable. There, however, exist the relevant provisions contained in sub-section (3) thereof to save the power to realise the property of a dissolved firm from the operation of sub-sections (1) and (2) thereof. It thus becomes clear that the power to realise the debt due to a dissolved firm will not be governed by sub-section (1) or sub-section (2) of Section 69 of the Act. The bar carried thereunder or either of them will not operate against a suit for recovery of a debt due and payable to an unregistered dissolved firm."

19. The ratio of the decision of Madras High Court was also followed by a learned single Judge of Andhra Pradesh High Court in the decision reported in AIR 1968 A.P 378 (SRI BABA COMMERCIAL SYNDICATE AND ANOTHER v. CHANNAMASETTI DASU AND ANOTHER), wherein it has been observed :-

"10. ... On the dissolution of the firm, therefore, the obligations of third parties to the firm may be enforced in the course of the winding up of the firm even though the firm was not a registered one. It can also be enforced if the firm is dissolved and by an arrangement the collection of the debts is entrusted to one of the partners or if one partner gives up his right as is the case here and the remaining sole partner is the only partner left. Sub-section (3) is attracted in all such cases and a suit can thus be instituted against a third party for the realisation of a debt. .... The words "power to realise the property of a dissolved firm" are wide enough to enable such a suit being brought. I have already stated that the words "power to realise the property of a dissolved firm" have to be construed in the widest sense and they undoubtedly include a right to realise a debt due to the firm. I have, therefore, no manner of doubt that since the firm is dissolved and the second defendant has walked out of the partnership leaving the 2nd plaintiff alone as the sole surviving partner of the dissolved firm, the second plaintiff can institute a suit for realising the debts based on a contract due to the dissolved firm from the first defendant."

20. More recently, a similar question was raised in this Court and the learned single Judge in the decision reported in 2001 (3) CTC 611 (VAIYAPURI v. M. SUNDARESAN AND 10 OTHERS), after

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referring to the decision of the Madras High Court and the Andhra Pradesh High Court, observed as follows :-

> "15. ... It is clear from the above decisions that in the case of a dissolved firm, the disability contemplated by the non-registration of the firm is not to apply. Law does not impose any disability on unregistered partnerships acquiring property or dealing with third parties. The only disability imposed is that no suit by an unregistered partnership is maintainable. It is evident that after the dissolution of a partnership it can no more be registered. It follows that if the partnership is dissolved, for bringing a suit to realise the property of such dissolved firm, non-registration of the firm will not be a bar."

21. In our opinion, the analysis of law made earlier, as has been done by the Division Bench of this Court in AIR 1948 Madras 187 (cited above), which has been followed in several other decisions of different High Courts, cannot be said to have been diluted in any manner in the decision of the Supreme Court reported in AIR 1977 SC 336 (cited supra). On the other hand, the observation made by the Supreme Court in para 21, which has been quoted, supports the view that a suit to recover the outstandings of a dissolved firm is not barred.

22. It was contended by the learned Senior Counsel for Defendant No.1 that notwithstanding the death of Smt.S. Indrani, S. Padmanabhan and Smt.L.T.D' Monte, respectively the 4th, 5th and 6th partners, the plaintiffs claimed that the partnership had continued and, therefore, it cannot be said that there had been any dissolution of the partnership.

That the aforesaid three persons had died is not in question. As a natural consequence of such death, it must be taken, the firm stood dissolved by virtue of Section 42(c) of the Partnership Act, which indicates that a firm is dissolved by the death of a partner. This clause is subject to contract between the partners.

23. In the present case, the partnership does not contain any clause that the partnership shall continue notwithstanding the death of any partner nor there is anything to imply such an agreement. In the absence of any provision to the effect that on the death of a partner the firm would not be dissolved, the natural consequence as envisaged in the statutory provision shall ensue. It is of course true that the plaintiffs have contended that the partnership had continued. Merely because of such contention, it cannot be held that the statutory consequence of dissolution of a firm on the death of a partner was not to ensue. It is not the case of either party that after the death of some of the partners a new

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partnership was formed among the surviving partners.

24. It has been held in AIR 1927 Madras 491 (ABDUL v. VAIKUNTAM) that even where the partnership is for a particular adventure, the death of a partner dissolves the firm even though the adventure is not complete.

25. Therefore, in view of the specific statutory provision and in the absence of any contract to the contrary, it must be taken that on the death of some of the partners, the partnership stood dissolved and therefore there is no embargo for realisation of the property of a dissolved partnership. Since it is the admitted case that the amount in question had been paid by three plaintiffs and their mother, who is no more, the claim of the plaintiffs for getting refund cannot be resisted by Defendant No.1. Even the defendants 2 to 8 had previously indicated by notice that they are ceased to be the partners and at any rate they have not contested the suit to claim any amount or any right in the property.

26. The next question is regarding the conclusion of the learned single Judge relating to the amount payable. In the 14 issues framed by the learned single Judge, Issue Nos.6, 7, 8 and 9 directly or indirectly relate to the question of amount paid to Defendant No.1 and as such refundable by him. Unfortunately, however, the learned single Judge has not dealt with the issues separately and the findings have been recorded in respect of all the 14 issues together. It is therefore necessary to cull out from the findings of the learned single Judge, scattered here and there, the relevant conclusions regarding the amount payable by Defendant No.1.

27. The conclusion that in all Rs.4,13,300/- was paid is based on three different types of payment. It is the specific case of the plaintiffs that on the date of agreement itself, a sum of Rs.2 lakhs had been paid as advance, which had been acknowledged by Defendant No.1 in the agreement itself. Subsequently, a sum of Rs.1,44,500/- had been paid by or on behalf of the plaintiffs on different dates. The third method of payment is relating to promissory notes, wherein the first plaintiff had stood as guarantor, and since the first plaintiff had paid such amount along with interest to the creditor, such promissory notes had been handed over to him and, therefore, such amount can be said to be the amount payable towards sale consideration.

28. In para 14 of the judgment, the learned single Judge seems to have accepted the contention of the plaintiffs that an advance of Rs.2 lakhs had been paid to Defendant No.1 on the date of the agreement, i.e., 15.3.1981. From para 15 of the judgment, it is apparent that the learned single Judge has accepted the evidence of P.W.1 that the plaintiffs paid a sum of Rs.1,44,500/- on different

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dates. In para 15, the learned single Judge has concluded that the payment of Rs.17,200/-, Rs.34,400/- and Rs.17,200/- had been made by Plaintiff No.1 to the holders of the promissory notes executed by Defendant No.1 and such payments had been made by Plaintiff No.1 in his capacity as guarantor in the promissory notes and had been paid on behalf of Defendant No.1 and the Defendant No.1 had corresponded with the father of Plaintiff No.1 to adjust such amount towards consideration as indicated in the agreement. It also appears from the aforesaid paragraph that the learned single Judge has apparently rejected the contention of the plaintiffs regarding payment of certain other promissory notes as well as the claim of the plaintiffs that interest on such amount should be taken to be part of the consideration amount paid to Defendant No.1. Ultimately, the learned single Judge has concluded that a sum of Rs.4,13,300/- was refundable.

29. Learned Senior Counsel appearing for the plaintiffs does not contend that in addition to the aforesaid amount certain other amounts are refundable. In fact his appeal is not against that part of the decree, but against the refusal to grant the decree for specific performance. Learned Senior Counsel for Defendant No.1 has, however, seriously challenged the conclusion on this aspect. More particularly, learned Senior Counsel for the defendants has submitted that even though there was a recital in the agreement dated 13.5.1981 that a sum of Rs.2 lakhs had been received as advance by Defendant No.1, in fact such amount had not been paid at the time of the agreement, but only some amount had been paid subsequently.

30. It is of course true that in the written statement Defendant No.1 had indicated that only a sum of Rs.1,05,000/- had been paid on different dates after the agreement. But, the conclusion of the learned single Judge that a sum of Rs.1,44,500/- had been paid has to be accepted. Such conclusion is based on documentary evidence Ex.P-6 as well as the oral evidence of D.W.1. It can be even stated that the oral evidence of D.W.1 supports such a conclusion. Ex.P-6, which seems to contain receipt/acknowledgement made by Defendant No.1 regarding receipt of various amounts on different dates. Such document indicates that a sum of Rs.35,000/- had been received by Defendant No.1 on 13.5.1981, a sum of Rs.5,000/- had been received on 18.5.1981, a sum of Rs.30,000/- had been received on 19.5.1981, a sum of Rs.14,000/-had been received on 20.5.1981, a sum of Rs.20,000/-had been received on 25.5.1981, a sum of Rs.10,000/-had been received on 3.6.1981, a sum of Rs.11,000/- was received on 16.6.1981, a sum of Rs.2,000/- was received on 25.8.1981, a sum of Rs.7,500/- was received on 14.9.1981, a sum of Rs.2,000/- was received on 26.12.1981, a sum of Rs.3,000/- was received on 28.12.1981, a sum of Rs.2,500/- was received on 2.1.1982 and a sum of Rs.2,500/- was received on 6.2.1982. As a matter of fact, Defendant No.1 examined as D.W.1 has so stated in his chief examination.

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Therefore, it is evident

that a sum of Rs.1,44,500/- has been paid on different dates.

31. The main dispute is as to whether a sum of Rs.2 lakhs had been paid on 13.5.1981. For coming to the conclusion that a sum of Rs.2 lakhs had been paid, the learned single Judge has merely relied upon Ex.P-2 agreement dated 13.5.1981, where the recital is to the following effect :-

> "Now it is agreed as follows :-
>
> 1. The vendor has received a sum of Rs.2,00,000/- (Rupees two lakhs only) as advance on this day from the parties 1,2,3 & 4 of the second part and handed over all the original documents which will remain as collateral security for the advance and other amounts to be paid."

32. It is the contention of the first defendant that even though there was a recital that he had received a sum of Rs.2 lakhs as advance on 13.5.1981 from the parties 1,2,3 & 4, i.e., 3 plaintiffs and their mother Smt.S. Indirani (now deceased), as a matter of fact, such amount had not been paid at that time and certain amounts had been paid on different dates.

33. It is no doubt true that there is a clear recital for the receipt of Rs.2 lakhs, but the materials and circumstances appear to indicate otherwise. In Ex.P-2 it has been specifically stated :-

> "2. The vendor undertakes to demolish within two months from this date and hand over vacant possession of the schedule mentioned property to the purchasers herein for starting their construction work.
>
> ...
>
> 5. The party of the second part undertake to clear the balance of consideration within 18 months from the date of handing over the vacant site for construction to the party of the second part." (Emphasis added)

34. From these clauses in the agreement, it is apparent that the intended purchasers undertook to clear the balance consideration within 18 months from the date of handing over the vacant site for construction. It is further clear that the vendor (Defendant No.1) had undertaken to demolish the existing structure and hand over vacant possession of the property within two months from the date of the agreement to enable the purchasers to start their construction work. In other words, it was envisaged that the purchasers were required and expected to pay the balance consideration within 18 months from the date of handing over of vacant site for construction. It is the admitted case of both the

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parties that due to various circumstances the vacant possession of the disputed property was never handed over. Since the purchasers were expected to pay the balance consideration within a period of 18 months from the date of handing over of vacant possession, it is hard to accept the contention of the plaintiffs that the amount received by Defendant No.1 under Ex.P-6 was part of the balance consideration of Rs.11 lakhs. Since the vacant possession had not been made over, it was obviously not expected nor stipulated that the purchasers should pay any further amount towards consideration. Rather, the very fact that the plaintiffs paid different amounts within a short time of the agreement, even though the vacant possession had not been delivered, supports the stand of Defendant No.1 that such amount paid in instalments were in fact towards the "so called advance of Rs.2 lakhs".

35. Let us now rivet our attention on the receipt. The first recital in the receipt is to the following effect:-

> "Received a sum of Rs.35,000/= (Thirty five thousand only) from N. Venkatesh, N. Kasiviswanathan, N. Ramesh and S. Indrani as further advance and part payment of sale consideration as per agreement for sale dated 13.5.81 for my Wallers Road property".

The words "further", "and" and "of sale consideration" are written definitely by a different pen (probably ball pen) and in different ink as compared to other recitals in such receipt. More importantly the expression "further" and the expression "of sale consideration" have been inserted above the normal writing and the expression "and" is inserted beyond the left margin. To the naked eye it is apparent that these expressions have been subsequently interpolated. If the aforesaid words are omitted, the receipt dated 13.5.1981 would read as follows :-

> "Received a sum of Rs.35,000/= (Thirty five thousand only) from N. Venkatesh, N. Kasiviswanathan, N. Ramesh and S. Indrani as advance part payment as per agreement for sale dated 13.5.81 for my Wallers Road property".

Even the date 18.5.1981 put under the signature on the stamp appears to be over-written.

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36. The second entry in such document, which contains the acknowledgment of payment on different dates, is also dated 18.5.1981. In other words, as per the purported receipts a sum of Rs.35,000/- was paid on 18.5.1981 and again a sum of Rs.5,000/- was paid on the very same date, the reason for which is beyond any comprehension. Since the balance consideration was envisaged to be paid only after the vacant possession was delivered, it also passes

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our comprehension as to why the plaintiffs paid such amount within a few days after the agreement of sale.

37. Apart from the above, it is found that on 11.5.1983 the first defendant had written a letter to the father of the plaintiffs, wherein it was categorically stated :-

> "Further to my recent personal meeting with you, it was pointed out that in accordance with our agreement a sum of Rupees two lakhs should have been paid to me as on 13th May, 1981. Actually you have paid me in instalments about a lakh of rupees upto February '82. Out of these payments, part were given as advances on your account and you have introduced some payments as loans from your nephew and other relatives. For the last 15 months no payments have been made despite my repeated requests."
>
> (Emphasis added)

In other words, the first defendant had asserted as early as on 11.5.1983 that payments made under the receipts contained in Ex.P-6 had been paid towards part of the advance of Rs.2 lakhs and he had called upon the father of the plaintiffs to take steps to complete the payment of Rs.2 lakhs within 15 days of receipt of such letter. It was also indicated that until and unless such initial payment was completed no further action could be taken from the side of Defendant No.1 to make available the site. It is of course true that such a letter was written to the father of the plaintiffs, but it has to be remembered that in fact the father of the plaintiffs was taking active role in finalising the agreement and completing the transaction, even though he was not shown as a formal party to the partnership. It is also to be remembered that Plaintiff No.1 was hardly aged about 21 or 22 at that time and the other two plaintiffs were minors.

38. Even though the agreement contains a recital that a sum of Rs.2 lakhs had been paid as advance, from the materials on record it is thus apparent that such amount had not been paid and the amount of Rs.1,44,500/-, which was paid between May, 1981 and February, 1982 ,represented the amount payable towards the advance of Rs.2 lakhs and do not represent any part payment towards balance consideration of Rs.11 lakhs. The insertion of strategic words such as "further", "and" and "of sale consideration" only confirms such conclusion.

39. We are therefore unable to uphold the conclusion of the learned single Judge that a sum of Rs.2 lakhs had been paid on 13.5.1981 in the absence of any independent and acceptable evidence and particularly in view of the suspicious features appearing in Ex.P-6.

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40. In the above context, the learned counsel appearing for the plaintiffs has contended that even though admittedly a sum of Rs.1,44,500/- had been paid on various dates, Defendant No.1 had falsely stated that he had received amount aggregating to Rs.1,05,000/- and, therefore, the defence plea that a sum of Rs.2 lakhs had not been received on the date of the agreement dated 13.5.1981 should be discarded.

41. It is no doubt true that Defendant No.1 had asserted in his written statement as well as in his evidence that a sum of Rs.1,05,000/- had been paid, but he had clearly stated in para 2 of the examination in chief relating to receipt of various amounts on different dates. As a matter of fact, he has subsequently stated in cross-examination *"I could have possibly received a sum of Rs.1,44,500/- vide Ex.P-6 series receipts. The witness adds that he cannot possibly add up the amount"*. Thus the possibility of Defendant No.1 having made such statement on wrong calculation cannot be ignored. Even otherwise, merely because Defendant No.1 insisted that he had received only Rs.1,05,000/-, it cannot be a ground to hold that, his plea that he had not received Rs.2 lakhs on 13.5.1981 is to be rejected *ipso facto*, more particularly keeping in view the tell-tale suspicious features and various circumstances analysed earlier.

42. The other part of the amount claimed by the plaintiffs is on the basis of the fact that the promissory notes in favour of three persons had been discharged by Plaintiff No.1. Learned single Judge has referred to the fact that Defendant No.1 himself has called upon the father of the plaintiffs to adjust such amount. No serious contention has been raised by the learned Senior Counsel appearing for Defendant No.1 disputing payment of Rs.68,800/-. Therefore, in partial modification of the judgment of the learned single Judge, we come to the conclusion that in all a sum of Rs.1,44,500 + 68,800/- = Rs.2,13,300/- had been paid to Defendant No.1.

43. Learned single Judge has directed that the plaintiffs were entitled to get interest at the rate of 18% per annum on Rs.2 lakhs and Rs.1,44,500/- from 13.5.1981 and on Rs.68,800/- from the respective dates found in Exs. P7 and P8 from 20.12.1984, and P9 from 1.1.1985 till realisation.

44. Payment of Rs.2 lakhs on 13.5.1981 has been disbelieved. Payment of Rs.1,44,500/- is not on 13.5.1981, but on different dates between 13.5.1981 and February, 1982. There is no stipulation in the agreement Ex.P-2 that Defendant No.1 is liable to pay interest on the amount paid to him towards consideration. No notice had been ever issued by the plaintiffs claiming that interest is payable by Defendant No.1 on the amount at a particular rate or

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from any particular date. The question of payment of interest on any particular amount due for the period prior to the date of filing of the suit is governed by the provisions contained in the Interest Act,1978, whereas the question of payment of interest during pendency of the suit and future interest thereafter is governed by Section 34 of the Code of Civil Procedure.

45. Sections 3 and 4 of the Interest Act, 1978, being relevant, are quoted hereunder :-

> "3. Power of court to allow interest.- (1) In any proceedings for the recovery of any debt or damages or in any proceedings in which a claim for interest in respect of any debt or damages already paid is made, the court may, if it thinks fit, allow interest to the person entitled to the debt or damages or to the person making such claim, as the case may be, at a rate not exceeding the current rate of interest, for the whole or part of the following period, that is to say, -
>
> (a) if the proceedings relate to a debt payable by virtue of a written instrument at a certain time, then, from the date when the debt is payable to the date of institution of the proceedings;
>
> (b) if the proceedings do not relate to any such debt, then, from the date mentioned in this regard in a written notice given by the person entitled or the person making the claim to the person liable that interest will be claimed, to the date of institution of the proceedings:
>
> Provided that where the amount of the debt or damages has been repaid before the institution of the proceedings interest shall not be allowed under this section for the period after such repayment.
>
> (2) Where, in any such proceedings as are mentioned in sub-section (1), -
>
> (a) judgment, order or award is given for a sum which, apart from interest on damages, exceeds four thousand rupees, and
>
> (b) the sum represents or includes damages in respect of personal injuries to the plaintiff or any other person, or in respect of a person's death,
>
> then, the power conferred by that sub-section shall be exercised so as to include in that sum interest on those damages or on such part of them as the court considers appropriate for the whole or part of the period from the date mentioned in the notice to the date of institution of the proceedings, unless the court is satisfied that there are special reasons why no interest should be given in respect of those damages.

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(3) Nothing in this section, -
(a) shall apply in relation to-

(i) any debt or damages upon which interest is payable as of right, by virtue of any agreement; or
(ii) any debt or damages upon which payment of interest is barred, by virtue of an express agreement;
(b) shall affect-
(i) the compensation recoverable for the dishonour of a bill of exchange, promissory note or cheque, as defined in the Negotiable Instruments Act, 1881 (26 of 1881); or
(ii) the provisions of rule 2 of Order II of the First Schedule to the Code of Civil Procedure, 1908 (5 of 1908);
(c) shall empower the court to award interest upon interest.

4. Interest payable under certain enactments. - (1) Notwithstanding anything contained in section 3, interest shall be payable in all cases in which it is payable by virtue of any enactment or other rule of law or usage having the force of law.

(2) Notwithstanding as aforesaid, and without prejudice to the generality of the provisions of sub-section(1),the court shall, in each of the following cases, allow interest from the date specified below to the date of institution of the proceedings at such rate as the court may consider reasonable, unless the court is satisfied that there are special reasons why interest should not be allowed, namely:-

(a) where money or other property has been deposited as security for the performance of an obligation imposed by law or contract, from the date of the deposit;
(b) where the obligation to pay money or restore any property arises by virtue of a fiduciary relationship, from the date of the cause of action;
(c) where money or other property is obtained or retained by fraud, from the date of the cause of action;
(d) where the claim is for dower or maintenance, from the date of the cause of action."

46. In the present case, the agreement as such does not contain any stipulation relating to payment of interest so far as Defendant No.1 is concerned nor there is any written notice calling

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upon Defendant No.1 to pay interest at any particular rate or from any particular date. In the absence of any stipulation and in the absence of any notice, we are afraid the plaintiffs are not entitled to get any interest for any period prior to the date of institution of the suit, which is apparent from the provisions contained in the Interest Act.

47. Even though the plaintiffs are not entitled to any interest on the amount prior to the institution of the suit, there is no embargo in granting interest from the date of filing of the suit till realisation. The transaction in question was obviously commercial in nature and therefore the proviso to Section 34 CPC can be applied. As per such proviso, the rate of interest shall not exceed the contractual rate of interest. There is no material on record to indicate what was the rate on which the monies are lent or advanced by the nationalised banks in relation to commercial transaction at the relevant time, i.e. either at the time of the transaction or even at the time of filing the suit. In the absence of any such material, we are constrained to award interest at the rate of 15% on the amount of Rs.2,13,300/- from the date of institution of the suit till the date of decree and thereafter till the date of payment.

48. In the result, O.S.A.No.401 of 2002 is allowed in part and the plaintiffs are entitled to a sum of Rs.2,13,300/- with interest at the rate of 15% per annum from the date of institution of the suit till the date of decree and thereafter till the date of deposit. O.S.A.No.128 of 2005, filed by the plaintiffs, is dismissed. There shall be no order as to costs so far as the present appeals are concerned.

After the judgment was pronounced, learned counsel appearing for the plaintiffs submitted that the documents in question are not available with the plaintiffs and an appropriate affidavit shall be filed by the plaintiffs indicating the loss of original documents within a period of two weeks. Once such affidavit is filed by the plaintiffs, the defendant / appellant can issue appropriate notice by publishing advertisement regarding the loss of original documents so that no doubt would be raised regarding the title of the defendant.

It is further stated that the appellant had deposited the amount as per the direction of the learned single Judge and such amount has been kept in fixed deposit. A sum of Rs.2,13,300/- along with interest as calculated as per the decision of this Court till the date of deposit along with the further proportionate accrued interest shall be paid to the plaintiffs and the balance amount shall be

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refunded to the defendant / appellant. This may be done by the Registry within a period of four weeks.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

dpk

To

1.The Sub Asst. Registrar, Original Side, High Court, Madras.

2. The Sub-Assistant Registrar, Judicial Section, High Court, Madras.

3. The Record-keeper, V.R. Section, High Court, Madras.

4.The Section Oficer, Accounts Section, High Court, Madras.

+2ccs to Mrs.S.Hemalatha, Advocate Sr 33393 & 33394
+2ccs to Mr.R.Subramanian, Advocate Sr 31911 & 31912

GM (CO)
km/28.8.

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